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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92072831
Party	Plaintiff Stella + Mochi LLC
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Submission	Motion to Amend Pleading/Amended Pleading
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration No. 5693777
Filed: March 9, 2018
Registration Issued: March 5, 2019
For Mark: MOCHI MUFFIN

STELLA + MOCHI LLC,

Petitioner,

v.

Cancellation No. 92072831

THIRD CULTURE FOOD GROUP DBA THIRD
CULTURE BAKERY CORPORATION,

**FIRST AMENDED PETITION FOR
CANCELLATION**

Respondent.

FIRST AMENDED PETITION FOR CANCELLATION

Third Culture Food Group doing business as Third Culture Bakery Corporation (“Registrant”), a company organized under the laws of California, with an address of 2701 Eighth St., Unit 101, Berkeley, CA 94710, is listed in the records of the United States Patent and Trademark Office (“USPTO”) as the registrant of United States Registration No. 5,693,777 for MOCHI MUFFIN (the “Mark”), issued March 5, 2019, for Pastries in International Class 30. Registrant identifies its goods in connection with the Mark as “Pastries; Pastry, Bakery goods and dessert items, namely, cakes, cookies, pastries, candies, and frozen confections for retail and wholesale distribution and consumption on or off the premises.” Registrant is represented by Michael Adams (madams@rutan.com), Meredith Williams (mwilliams@rutan.com), and Lindsay

Huller (lhulley@rutan.com) of Rutan & Tucker LLP, located at 611 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626, with a telephone number of (714) 641-5100.

Stella + Mochi LLC (“Petitioner”), a limited liability company organized under the laws of California and managed by Kathleen Baran (also known as Kathleen Baran Shen), with an address of 11616 Andanza Way, San Diego, CA 92127, believes that it will be damaged by the continued registration of the Mark and hereby petitions to cancel the Registration pursuant to 15 U.S.C. § 1091 and Trademark Trial and Appeal Board Manual of Procedure Rule 309.03(c)(1) based on the Mark’s generic nature.

As grounds for cancellation, it is alleged that:

1. Petitioner owns and operates a business that sells a variety of bakery goods, pastries, and desserts incorporating an ingredient called mochi, including but not limited to muffins.
2. As a baking business that makes bakery goods, pastries, and desserts using mochi, Petitioner is left without the ability to appropriately describe its goods given the Mark’s Registration and thus has standing to challenge the Mark pursuant to Trademark Trial and Appeal Board Manual of Procedure Rule 303.03 because it has a direct and personal stake in the outcome of the proceeding.
3. Mochi is a generic name for bakery goods, pastries, and desserts made using mochi flour. wiseGeek, *What is Mochi Rice?*, <https://www.wisegeek.com/what-is-mochi-rice.htm> (last visited November 11, 2019).¹ Mochi flour is made using mochigome, also known as mochi rice, which

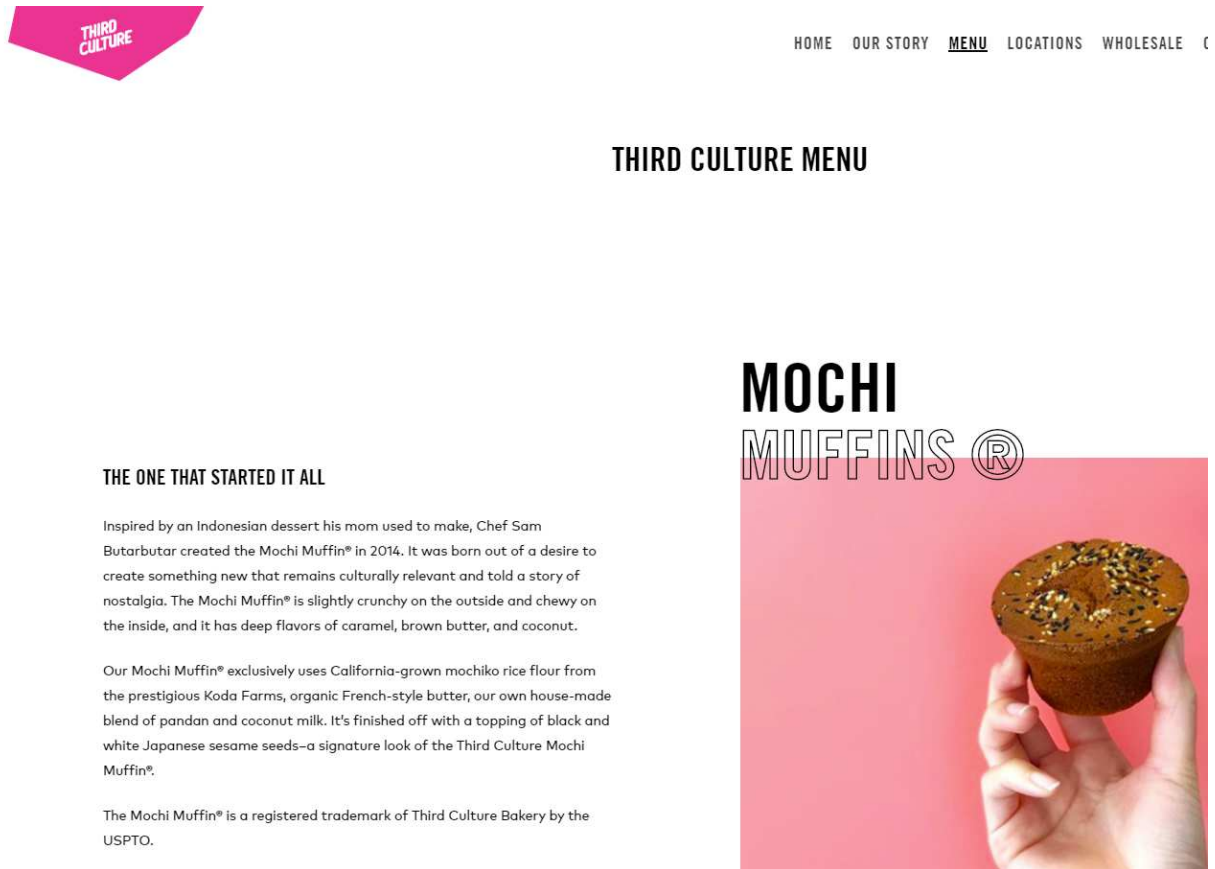
¹ The USPTO has previously found that material obtained from the internet can be considered. *See e.g., In re Leonhardt*, 109 USPQ2d 2091, 2098 (TTAB 2008) (accepting Internet evidence to show descriptiveness); *In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) (accepting Internet evidence to show genericness); *In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1641-42 (TTAB 2011) (accepting Internet evidence to show geographic location was well-known for particular goods); TBMP §1208.03; TMEP §710.01(b).

is a sweet glutinous rice ground into fine flour and is also known as sweet rice flour or mochiko. *Id.*; Just One Cookbook, *Sweet Rice (Glutinous Rice)*, <https://www.justonecookbook.com/sweet-rice-glutinous-rice/> (last visited November 11, 2019).

4. The Japanese word for flour is Komugiko, and an acceptable abbreviation is Ko. Word Hippo, *What does 小麦粉 (Komugiko) mean in Japanese?*, <https://www.wordhippo.com/what-is/the-meaning-of/japanese-word-89112c84ffb4002616d62a1a089a755c75a30068.html> (last visited November 11, 2019).

5. Thus the word Mochiko is simply a combination of the name for a sweet glutinous rice (mochigome or mochi) ground into flour (komugiko or ko) and directly translates to mochi flour. Food and Wine, *5 Tips for Baking with Mochiko*, <https://www.foodandwine.com/blogs/2014/4/25/5-tips-for-baking-with-mochiko> (last visited November 11, 2019).

6. Registrant uses mochiko, also known as mochi flour, to make its mochi muffins:



<https://thirdculturebakery.com/menu/>

7. Registrant’s website underscores the fact that “Mochi” is the name of an ingredient, a key aspect, a central focus or feature, and a main characteristic of the goods. It is not possible to refer the Registrant’s goods without using the word mochi because the applicant’s goods are made out of mochi. Thus, “Mochi,” as used by Registrant in relation to the identified goods, is incapable as a source identifier for its bakery goods, pastries, or desserts.

8. Muffin is defined by Merriam-Webster as “a quick bread made of batter containing egg and baked in a pan having cuplike molds.” Merriam-Webster, *Muffin Definition*, <https://www.merriam-webster.com/dictionary/muffin> (last visited March 3, 2020).

9. Registrant's March 9, 2018 application for the Mark includes a specimen, a July 28, 2016 San Francisco Chronicle article, in which the bakery good/pastry/dessert that Registrant sells using the Mark is described as a muffin, and in which it is explained that Registrant's bakery good/pastry/dessert is cooked in a muffin tin.

10. Registrant's additional specimens submitted on December 26, 2018, all depict bakery goods/pastries/desserts in the shape generically known as a muffin.

11. Registrant's Certificate for the Mark acknowledges that muffin is in and of itself generic as Registrant is not granted exclusive right to use the generic term alone.

12. Thus "Muffin" is simply a reference to a key aspect, a central focus or feature, and a main characteristic of the goods. It is not possible to refer the Registrant's goods without using the word muffin because they are a bakery good/pastry/dessert made with batter containing egg and baked in a pan having cuplike molds. Thus, "Muffin," as used by Registrant in relation to the identified goods, is incapable as a source identifier for its bakery goods, pastries, or desserts.

13. Each of the constituent words, Mochi and Muffin, are themselves generic, and when combined, lend no additional meaning to the total combination. Thus, the Mark is a generic compound term.

14. Ordinary consumers, the relevant public purchasing or consuming Registrant's goods, primarily understand the term "Mochi Muffin" to be the generic name or identifier of bakery goods, pastries, and desserts.

15. "Mochi Muffin" is widely used generically to identify bakery goods, pastries, and desserts:



<https://twitter.com/ramenoakland/status/1028340404339408896> (last visited March 3, 2020).



HOME WEST MIDWEST SOUTHEAST NORTHEAST SOUTH WEST

Mochi muffins feature of new Dallas Farmers Market stand

August 22, 2019 by Lisa

At the Dallas Farmers Market, Oppa Treats, a new pop-up stand, is familiarizing Dallas residents with mochi muffins, a West Coast luscious treat.

A local bakery, Oppa Treats specializes in mochi muffins a moist, dense, tasty treat that is a variation of a classic Hawaiian dessert. Mochi is part of other desserts among which is Bubbies, which contains a thin chewy mochi layer covering an ice cream filling; as well as the chewy bits that serve as a topping to be sprinkled over frozen yogurt.

Oppa's was founded by Peter Hong in 2018. He collaborated with local businesses while also doing pop-ups. Presently Hong is camped out at the Farmers Market at the Chelles Macarons space, each Saturday.

Banner printing is often used to attract attention of passersby to a new establishment and flyer printing may be used to inform those that may not be in the vicinity.

In making mochi a rice flour is used, which accounts for its distinctive texture. By baking the mochi in small muffin shapes a maximum contrast of textures is achieved: a crispy exterior with a dense, chewy center.

Oppa Treats', size wise, are about a three-bite muffin and include the flavors of churro, banana nut, crème brulee, sesame, pandan and ube, which is also known as purple yam.

A single mochi muffin is \$2 and \$3.50 for two. Oppa's mochi muffins are gluten free.

<https://www.shop.minutemanpress.com/news/southwest/texas/dallas/mochi-muffins-feature-of-new-dallas-farmers-market-stand-148087.html> (last visited March 3, 2020).



Kare-ya! A Japanese & Southern Fusion

The Tinker Kitchen community presents its first ever pop-up dining experience! Drawing from their love of food, culture, and science, Ashley & TP are serving up a unique and fun 2 course meal that plays with ingredients and dishes from Japan and the American South.

Menu

Entree: Japanese Chicken Curry Over Biscuits

Dessert: Apple Pie Mochi Muffin Topped with Vanilla Bourbon Ice Cream

● <https://tinkerkitchen.org/event/kare-ya-japanese-southern-fusion-popup?id=105> (last visited March 3, 2020)

16. Joining the word Mochi to Muffin does not result in any different meaning from its constituent words. The two words retain their generic significance when combined and when considered in the context of the Registrant's identification of goods, and the Mark is simply the name by which consumers call bakery goods, pastries, and desserts.²

17. The Mark is incapable of functioning as a source-identifier for Registrant's goods.

18. Notably, the USPTO has denied the registration of numerous marks related to food with the word mochi in them precisely because of their generic nature. *See e.g.* MOCHI ICE CREAM

² Petitioner notes that Registrant has applied for additional food related trademarks with the term mochi that should be denied registration based on their similar generic and descriptive nature: BUTTER MOCHI DONUT (Serial No. 88654924); MOCHI BROWNIE (88654874); MOCHIYAKI (Serial No. 88654944) (yaki being a suffix that is often used to describe certain types of Japanese waffles).

(Serial No. 87107426); MOCHI FLOUR (Serial No. 86577875); MOCHI CREAM (Serial No. 79042959); MOCHICREAM (Serial No. 79042727).

WHEREFORE, Petitioner believes that it is being damaged by the Registration and requests that cancellation be sustained and the Registration of the Mark be cancelled.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is attorney for Stella + Mochi LLC, Petitioner in the above-captioned Cancellation proceeding, and that on the date which appears below, she caused a copy of the foregoing pleading to be served on the following via email as indicated below.

Respondent:

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Dated: March 9, 2020

/s/ Vanessa Barsanti
Vanessa Barsanti